

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GINA CHAMPION-CAIN, an individual; LUV SURF, LP, a California limited partnership; ANI COMMERCIAL CA I, LLC, a California limited liability company; and ANI COMMERCIAL CA II, LP, a California limited partnership,

CASE NO. 14-cv-2540-GPC-BLM
ORDER ON *EX PARTE* APPLICATIONS
[ECF Nos. 37, 38, 41]

Plaintiffs,

v.

BRIAN MACDONALD, an individual; LOVESURF, INC., a Delaware corporation, and DOES 1-10, inclusive,

Defendants.

Since filing their reply brief supporting their preliminary injunction motion on April 20, 2015, Plaintiffs have filed three *ex parte* applications relating to the pending preliminary injunction motion.

On May 22, 2015, Plaintiffs filed an *Ex Parte* Application for Leave to Submit New Evidence in Support of Motion for Preliminary Injunction. (ECF No. 37.) Defendants filed a response on June 2, 2015. (ECF No. 42.)

On May 27, 2015, Plaintiffs filed an *Ex Parte* Motion for Order Permitting Oral Argument and Limited Witness Testimony on Plaintiffs' Motion for Preliminary

1 Injunction. (ECF No. 38.) Defendants filed a response on June 3, 2015. (ECF No.
 2 43.)

3 Finally, on June 2, 2015, Plaintiffs filed an *Ex Parte* Application for Leave to
 4 Submit Additional Evidence in Support of Motion for Preliminary Injunction. (ECF
 5 No. 41.) Defendants filed their opposition on June 3, 2015. (ECF No. 45.) Plaintiffs
 6 filed a reply on June 11, 2015. (ECF No. 48.)

7 **DISCUSSION**

8 **A. New Evidence**

9 In their May 22, 2015 and June 2, 2015 applications, Plaintiffs seek leave to
 10 submit new evidence showing likelihood of irreparable harm, which is a required
 11 element for obtaining a preliminary injunction. (ECF No. 37 at 2; ECF No. 41 at 2-3.)
 12 Specifically, Plaintiffs wish to submit the following:

- 13 1. An email, dated May 15, 2015, from Nordstrom informing a
 14 representative for Plaintiffs that Nordstrom will stop selling Plaintiffs'
 15 merchandise (Ex. A, ECF No. 37) as a result of a cease and desist letter
 16 sent by Defendants (Ex. B, ECF No. 37).
- 17 2. An email, dated May 13, 2015, from Defendant Brian MacDonald to the
 18 organizer of the "Sisters of the Sea" female surf competition asking that
 19 she not publish Luv Surf's logo or brand on "Sisters of the Sea"
 20 marketing materials because they were stolen. (Ex. A, ECF No. 41.)
- 21 3. An email, dated May 27, 2015, from Defendant Brian MacDonald to one
 22 of Plaintiffs' brand ambassadors encouraging her not to do business with
 23 Plaintiffs because Luv Surf is "a[n] embarrassing copy of LOVESURF."
 24 (Ex. B, ECF No. 41.)
- 25 4. Screenshots of Defendants' website wherein Defendants discuss the
 26 Nordstrom issue and cite to other content showing that Luv Surf is a "rip-
 27 off brand." (Ex. C, ECF No. 41.)

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1 Defendants object to this evidence on various grounds, including that
 2 (1) Defendants claim priority on the mark, so it would be improper to prevent them
 3 from competing for customers, (2) Defendants will suffer prejudice because they will
 4 not have an opportunity to address this evidence before the hearing on the preliminary
 5 injunction motion, (3) Plaintiffs cite no authority for their requests, (4) determinations
 6 of the truth or falsity of Defendants' speech must be made at trial, not as part of a
 7 preliminary injunction determination, (5) Plaintiffs' cannot show irreparable harm
 8 anyway because of their long delay in bringing the preliminary injunction motion, and
 9 (6) the evidence does not show a threat of *future* harm (and any existing harm can be
 10 remedied through monetary damages). (ECF Nos. 43, 45.)

11 The Court finds the three emails, the cease and desist letter, and the screenshots
 12 listed above to be directly relevant to Plaintiffs' showing of irreparable harm and will
 13 consider them in relation to Plaintiffs' pending preliminary injunction motion. District
 14 courts have broad discretion to consider arguments first raised in a reply brief, *Lane v.*
 15 *Dept. of Interior*, 523 F.3d 1128, 1140 (9th Cir. 2008) (*citing Glenn K. Jackson, Inc.*
 16 *v. Roe*, 273 F.3d 1192, 1201–02 (9th Cir. 2001)), and, given that Plaintiffs filed their
 17 applications prior to the hearing, the Court believes it has discretion to consider the
 18 new evidence. All three emails were sent well after Plaintiffs filed their reply brief, so
 19 Plaintiffs could not have included them in their briefing on the motion. The
 20 screenshots were taken by Chris Kramer, who filed a declaration supporting Plaintiffs'
 21 application. (Kramer Decl. ¶ 6, ECF No. 41-1 at 3.) Though Mr. Kramer does not state
 22 the date on which he took the screenshots, the exhibits themselves contain content
 23 describing events that took place in June of 2015, so they appear to be recent as well.
 24 (*See id.*; Ex. C, ECF No. 41.) Additionally, the exhibits were attached to Plaintiffs' *ex*
 25 *parte* applications, so Defendants had the opportunity to review them and present their
 26 arguments in their opposition briefs. (*See* ECF Nos. 42, 43, 45.) Further, in order to
 27 prevent prejudice to Defendants, the Court also will allow Defendants the opportunity
 28 to address this evidence at the hearing. *See Provenz v. Miller*, 102 F.3d 1478, 1483

1 (9th Cir. 1996) (a court admitting arguments submitted for the first time in a reply brief
 2 should protect the non-moving party against unfair surprises by allowing it an
 3 opportunity to respond); *Lewis v. Gotham Ins. Co.*, No. 09CV252 L (POR), 2009 WL
 4 3698028, at *1 (S.D. Cal. Feb. 4, 2010) (when considering new arguments raised in a
 5 reply brief, the court should either “provide oral argument to the non-moving party, or
 6 allow the non-moving party to file a sur-reply”).

7 **B. Testimony**

8 In Plaintiffs’ May 27, 2015 application, Plaintiffs request oral argument on their
 9 preliminary injunction motion and the opportunity to offer “percipient / expert
 10 testimony.” (ECF No. 38.) It appears the testimony they seek to present is that of their
 11 forensic analyst, Peter Garza. (*Id.*) Defendants object to Mr. Garza providing any
 12 testimony. (ECF No. 43.)

13 The Court will hold a hearing on Plaintiffs’ preliminary injunction motion on
 14 May 18, 2015. However, Plaintiffs cite no authority in support of their request to
 15 present expert testimony. Moreover, given the parties’ ongoing dispute regarding
 16 whether Plaintiffs’ filing of Mr. Garza’s declaration violated the parties’ protective
 17 order or their separate agreement regarding his review of Defendants’ computer files,
 18 the Court finds it inappropriate to allow the opportunity for further disclosures at this
 19 time. Plaintiffs’ request for witness testimony, therefore, is denied.

20 **CONCLUSION**

21 For the foregoing reasons, the Court orders as follows:

- 22 1. Plaintiffs’ *Ex Parte* Application for Leave to Submit New Evidence in
 23 Support of Motion for Preliminary Injunction (ECF No. 37) is
 24 **GRANTED**.
- 25 2. Plaintiffs’ *Ex Parte* Motion for Order Permitting Oral Argument and
 26 Limited Witness Testimony on Plaintiffs’ Motion for Preliminary
 27 Injunction (ECF No. 38) is **GRANTED** to the extent that the Court will
 28 hear oral argument by counsel on June 18, 2015, and **DENIED** to the

1 extent Plaintiffs seek permission to present witness testimony.

2 3. Plaintiffs' *Ex Parte* Application for Leave to Submit Additional Evidence
3 in Support of Motion for Preliminary Injunction (ECF No. 41) is
4 **GRANTED.**

5 **IT IS SO ORDERED.**

6 DATED: June 17, 2015

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8 HON. GONZALO P. CURIEL
United States District Judge

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